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IN THE
Supreme Court of the United States

OCTOBER TERM, 1939.

No. 474.

JOSEPH D. McGOLDRICK, Comptroller of the
City of New York,

Petitioner,

against

A. H. DUGRENIER, INC., Principal, and
STEWART & McGUIRE, INC., Agent,

Respondents.

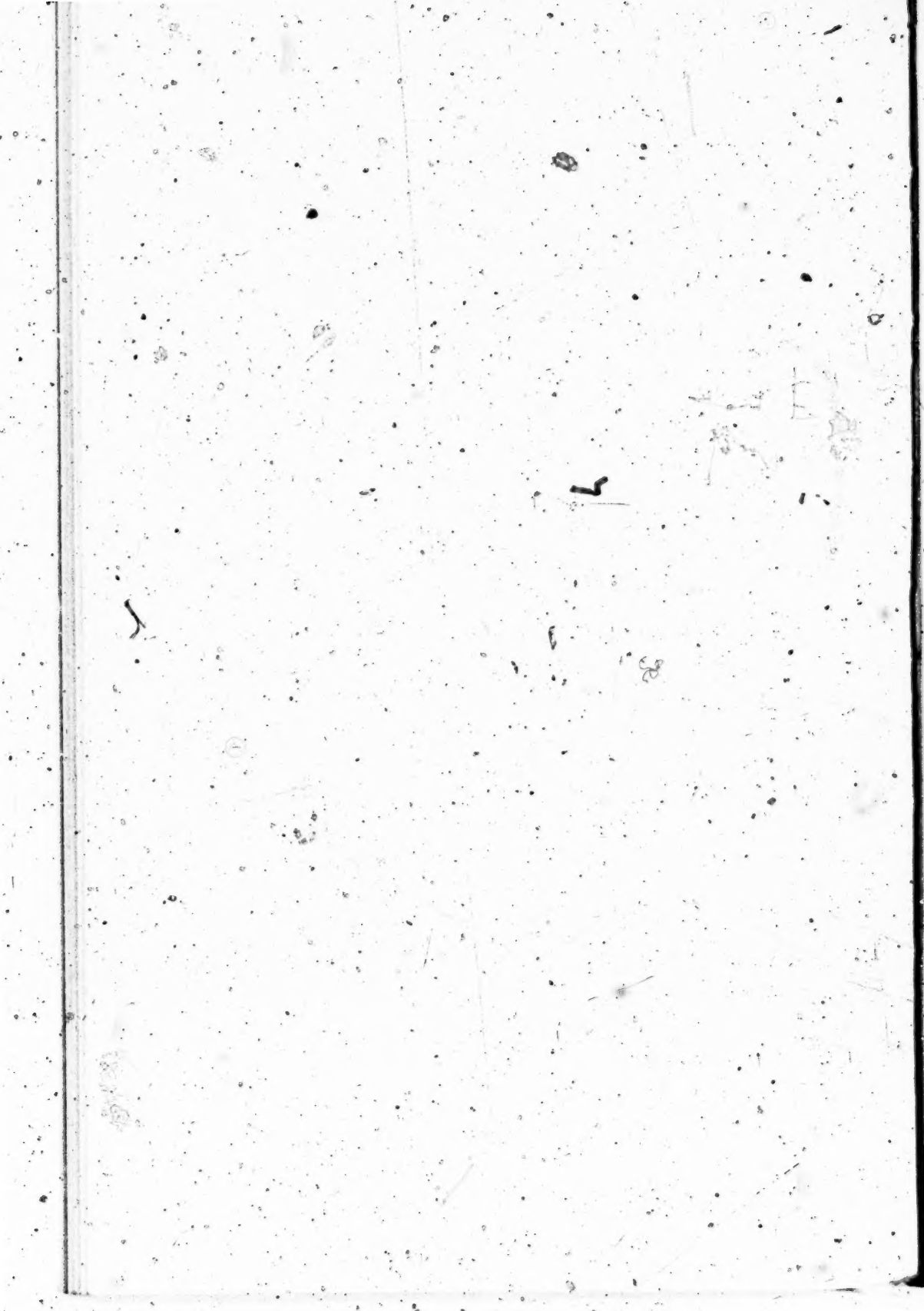
ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENTS

JOHN H. JACKSON,

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Attorneys for Respondents.



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OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENTS.

This case is before the Court on a writ of certiorari to review a judgment of the Supreme Court of the State of New York, entered pursuant to the order of the Court of Appeals of the State of New York (R. 48), annulling the determination of petitioner that respondent A. H. DuGrenier, Inc., as principal, and respondent Stewart & McGuire, Inc., as agent, were liable for certain New York City sales taxes. After a hearing before petitioner's predecessor as Comptroller of the City of New York, the Comptroller made a final determination of a deficiency in tax in the amount of \$6,203.27 (including interest and penalties) (R. 29), which amount respondent A. H. DuGrenier, Inc.,

thereafter paid to the Comptroller under protest (R. 30). Proceedings were taken by the respondents to obtain a review of the Comptroller's determination by the Appellate Division of the Supreme Court, which Court thereafter made its order (R. 43) upon which judgment was entered (R. 44) annulling the determination and directing refund to the respondent A. H. DuGrenier, Inc., of the amount paid. On appeal to the Court of Appeals, the judgment of the Appellate Division was affirmed.

Opinions Below.

The memorandum opinion of the Appellate Division (R. 46) is reported in 255 App. Div. 961. The affirmance by the Court of Appeals was without opinion (R. 49). After the entry of judgment on the order of the Court of Appeals, the remittitur was amended to state that the order of the Appellate Division was affirmed "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (R. 1, Sec. 8, Cl. 3) of the Constitution of the United States (R. 55)."

Statement of Facts.

The respondent A. H. DuGrenier, Inc., is a Massachusetts corporation, engaged in the business of manufacturing automatic vending machines at Haverhill, Massachusetts (R. 32). It has no office or employee in New York and does not keep any stock of goods there (R. 32). The respondent Stewart & McGuire, Inc., a New York corporation, is the exclusive agent of A. H. DuGrenier, Inc., for the sale of machines throughout the entire country (R. 34, 35). It maintains an office in New York City (R. 33). All of the expenses incurred in the sale of the DuGrenier machines are paid by Stewart & McGuire (R. 40).

Stewart & McGuire, Inc., is not authorized by A. H. DuGrenier, Inc., to accept orders on its behalf. All orders must be accepted by A. H. DuGrenier, Inc., at Haverhill (R. 37, 35). Most of the sales are made on conditional sales agreements, although a few are made on open account (R. 34). In the usual transaction a conditional sales agreement is executed by the customer in triplicate, forwarded to Haverhill for acceptance, and if accepted and executed by A. H. DuGrenier, Inc., one of the triplicate forms is recorded in the proper public office, one is retained by A. H. DuGrenier, Inc., and one is sent to the customer (R. 33, 34).

Delivery of the machines is made by A. H. DuGrenier, Inc., directly to the customers (R. 37). The customer pays the freight (R. 37). Stewart & McGuire, Inc., keeps some sample machines in its office, but these are sold to it by A. H. DuGrenier, Inc. (R. 37).

The statement at page 3 of the petitioner's brief to the effect that there is no evidence that the customer is ever "notified of confirmation", is inconsistent with the evidence just stated, to the effect that a signed copy of the contract is mailed to the customer. The statement that the checking of customer's credit as a condition to acceptance of the order "is a mere formality" (Petitioner's Brief, p. 3) is without foundation in the record.

Questions Presented.

The scope of the decision about to be reviewed cannot be understood without reference to *Matter of National Cash Register Co. v. Taylor*, 252 App. Div. 90; affd. 276 N. Y. 208; cert. den. 303 U. S. 656. The decision of the Appellate Division in that case rested not on the constitutional question now presented to this Court, but on the construction of the Enabling Act pursuant to which the City im-

posed the tax (Laws of 1934, Ch. 873). The Enabling Act excluded from the field of the City's power to tax "any transaction originating and/or consummated outside of the territorial limits of the City". The Appellate Division held that a sale "originated", within the meaning of the Enabling Act, at the place where the contract of sale was made, and that consequently where, as in the instant case, orders for the shipment of goods were accepted outside of the State, the City could not impose a tax upon the sale.

The Court of Appeals rested its decision solely on the constitutional ground and expressly withheld any expression of opinion upon the question of construction passed upon by the Appellate Division (See opinion of LEHMAN, J., at p. 214).

The instant case was decided by the Appellate Division after the decision of the Court of Appeals in the *National Cash Register* case, and it is the Court of Appeals decision in that case which is cited in the Appellate Division memorandum opinion. The other cases cited are cases in which the Court of Appeals decision in the *National Cash Register* case was followed. It is clear therefore that the instant case was decided on the constitutional ground. It is equally clear, however, that the only decision of the New York courts on the question of the construction of the statute is the Appellate Division decision in the *National Cash Register* case, 252 App. Div. 90. While in its subsequent decisions invalidating the tax the Appellate Division adopted, as it was bound to, the ground given by the Court of Appeals in the *National Cash Register* case, it has never retracted or modified anything which was said in its own opinion in the same case, and so far as the New York Courts have spoken they have held that the local law, as

applied to sales here involved, exceeds the power delegated to the City by the State legislature.

It follows from the foregoing that the statement in the petitioner's brief (p. 6) that the Court of Appeals by its amendment of the remittitur "has indicated clearly that the tax assessment here involved is in entire conformity both with the New York City local law pursuant to which it was imposed (Local Law No. 20 of 1934, as amended), and the State enabling act pursuant to which the local law was enacted (New York Laws of 1934, ch. 873)" is wrong. The Appellate Division has held the contrary (with respect to the sort of sales involved in this case), and the Court of Appeals had declined to pass on the question because it considered the constitutional ground controlling and sufficient.

If this Court should hold the tax constitutional the ultimate question of tax liability will still depend upon a determination of the question whether these sales "originated" in the City of New York within the meaning of the Enabling Act. In an analogous case, *State Tax Commission v. Van Cott*, 306 U. S. 511, this Court recently, upon reversal of the State Court, remanded the cause for consideration of the question arising under the State law; and it is believed that this procedure should be followed here if the judgment is reversed upon the constitutional question.

The determination of the Comptroller purports to assess the tax against the respondent Stewart & McGuire, Inc., as "agents" as well as against the respondent A. H. DuGrenier, Inc. (R. 29). There is no warrant in the local law for assessment against the agent of either vendor or purchaser, but the question having become moot by pay-

ment of the tax by the respondent A. H. DuGrenier, Inc., the point is not pressed.

Summary of Argument.

A. The New York City sales tax as applied to the transactions involved in this case violates Article 1, Section 8, Clause 3 of the Constitution of the United States in the following respects:

I. It imposes a direct and immediate burden upon transactions constituting interstate commerce.

II. It exposes the Massachusetts manufacturer to taxation by both New York and Massachusetts on the same transaction.

III. It discriminates between the Massachusetts manufacturer seeking to sell his machines here and some of his local competitors. It is true that locally manufactured vending machines are subjected to the same tax, but the vending machine, being a labor saving device, is competitive not merely with other vending machines, but with local labor. The tendency of the tax is to encourage the employment of salesmen to replace machines. This is no less an interference with interstate commerce because it is also an interference with local commerce.

B. *Felt & Tarrant Manufacturing Co. v. Gallagher*, 306 U. S. 62, has no bearing on the case. There this Court upheld the constitutionality of a California statute which made the non-resident seller the agent of the State to collect a tax imposed on property in the State. New York City has a personal property tax analogous to this California tax, but the local law which imposes the New York City personal property tax contains no provision imposing any duty of collection upon the non-resident seller. If the tax in this case is to be sustained, it must therefore be

sustained not as a tax on the ownership or use of property, but as a sales tax.

The New York City Personal Property Tax Law is not printed in the appendix of statutes submitted to the Court by the petitioner. It will be found set forth in full as an appendix to this brief.

On page 6 of the petitioner's brief we are referred to the argument made in support of the tax in the *Berwind-White Coal Mining Co.*, and the *Felt & Tarrant Manufacturing Co.* cases, which immediately precede this case on the calendar. Much that is in these briefs, however, does not bear upon the facts of the instant case. For example, we assume that the specification of error (b) appearing in all of these cases to the effect that the sales which were the subject of the tax were not contracts for interstate shipment and do not require or necessarily involve interstate commerce, is intended to relate to some other case than this. It obviously has no application here.

POINT I.

The tax is violative of the Commerce Clause because it imposes a direct and immediate burden upon transactions constituting interstate commerce.

The tax here is on the sale itself. Section 2 of the Sales Tax Law provides:

"§2. Imposition of Tax. During the period commencing on December tenth, nineteen hundred and thirty-four, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of: • • •"

Section 1 contains the following definition:

"(3) The word 'sale' or 'selling' means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law."

What constitutes interstate commerce is "a practical and not a technical consideration" (*Davis v. Virginia*, 236 U. S. 697); but it has never been doubted that once a transaction or activity is found to be or constitute interstate commerce the imposition of a tax on that transaction or activity by the State is forbidden by the Commerce Clause. There is a clear distinction between a tax on such a transaction or activity and one upon some subject matter which is within the taxing power of the State but which may nevertheless have the purpose or effect of interfering unduly with interstate commerce. In a case of the latter kind the tax will not be invalidated unless its purpose or effect is discriminatory. No question of discrimination, however, arises where the subject matter of the tax is some integral part of the process of interstate commerce, *i. e.*, a matter over which the Federal Government has the exclusive power of regulation. Upon this point the decisions of this Court have been consistent from *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887), to the recent decisions in *Adams Mfg. Co. v. Storen*, 304 U. S. 307, and *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434.

In *Robbins v. Shelby County Taxing District*, *supra*, at page 497, the Court said:

"Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state."

In *U. S. Glue Co. v. Town of Oak Creek*, 247 U. S. 321, 328, the Court said:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental."

In *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555, 568, **BRANDEIS, J.** (dissenting), said:

"* * * A state tax is obnoxious to that provision of the Federal Constitution only if it directly burdens interstate commerce, or (where the burden is indirect) if it obstructs or discriminates against such commerce."

"* * * A tax is a direct burden, if laid upon the operation or act of interstate commerce." (p. 569)

While these quotations are from a dissenting opinion, the dissent was from a decision invalidating a State tax attacked under the Commerce Clause, and it may consequently be taken as a statement of the law as favorable as possible to the petitioner's contentions in the instant case.

In *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249, 267, this Court referred to a direct burden as one "levied upon or measured by" the interstate transaction, and in *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, a distinction was drawn between "taxes on interstate commerce and its instrumentalities" and on "operations closely connected with but distinct from that commerce."

In *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 312, the Court says:

"* * * The opinion of the State Supreme Court stresses the generality and nondiscriminatory charac-

ter of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce."

The Court cites as authority for this rule *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292; *Spalding & Bros. v. Edwards*, 262 U. S. 66, 69; *Cooney v. Mountain States Tel. Co.*, 294 U. S. 384, 393.

In *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 438, the Court said:

"The constitutional effect of a tax upon gross receipts derived from participation in interstate commerce and measured by the amount or extent of the commerce itself has been so recently and fully considered by this Court that it is unnecessary now to elaborate the applicable principles."

The tax which we are now considering is laid upon a transaction of sale between a Massachusetts manufacturer not doing business in New York and a resident of the City. It calls for the shipment of goods from the seller in Massachusetts direct to the purchaser in New York City. It is the type case of interstate commerce; an integral or unitary act which has one phase or aspect in New York and another phase or aspect in Massachusetts. The contract is made in Massachusetts: the title usually passes in New York, but, as was said by HOLMES, J., in *Dozier v. Alabama*, 218 U. S. 124,

"... what is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed."

POINT II.

The tax is violative of the Commerce Clause because it exposes the manufacturer to the danger of double taxation on the same transaction.

In the petitioner's brief in the *Berwind-White* case (p. 40), it appears to be conceded that if the transaction which is the subject of the tax could consistently with the Fourteenth Amendment be taxed in more than one State, the tax is unconstitutional under the Commerce Clause, and *Adams Mfg. Co. v. Storen*, 304 U. S. 307, and *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, are referred to as declaring that rule of law. In the respondent's brief in the *Berwind-White* case, it is argued at length that the possibility of multiple taxation exists under the facts there presented, and we adopt that argument. But the instant case is stronger for the taxpayer; for here the contract of sale was made in Massachusetts and it is beyond the possibility of dispute that it would be taxable there.

POINT III.

As an economic fact the tax is discriminatory as against residents of other States and tends substantially to discourage the sale of vending machines in interstate commerce.

In arguing this point we of course do not concede that it is necessary, in order to invalidate the tax under the commerce clause, that it be discriminatory.

To assume because the local manufacturer of vending machines pays the same tax as the foreign manufacturer no interference with interstate commerce results, is to take far too narrow a view of the economic process. Competition operates not only between identical goods and services,

but also between things, one of which may be used as a substitute for the other, *eg.*, candy competes with cigarettes, as was manifested not many years ago by the enormous expenditure of money by one of the tobacco companies in advertising the "slogan", "Reach for a Lucky instead of a sweet". The economic law is stated in Professor Seligman's *Principles of Economics* (Eleventh Edition, Revised, 1926), pages 142-3, in the following language:

"Every individual is constantly debating with himself whether to purchase one commodity in preference to another. Where he is on the margin of doubt or indifference the slightest alteration in the price will cause him to substitute something else. The principle involved is hence called the principle of substitution. The vendor must constantly be on the watch lest any increase of price cause the disappearance of his sales. We substitute, however, not only one thing for another, but also one agency of production for another; in the crucible of economic wants everything is finally tested by its capacity to afford the greatest satisfaction. Not only will the consumer choose now this and now that commodity, *but the employer will increase now his labor force, now his machinery* so as to secure the best results. The least change in the rate of wages or interest may lead him to substitute the one for the other."

The vending machine is a mechanical salesman. It makes change and delivers goods to the purchaser just as a clerk behind the counter does. It has certain advantages over the human salesman, *e. g.*, it is never guilty of petty dishonesty. On the other hand, it lacks oral persuasiveness. The proprietor of a store or restaurant must weigh these considerations and then put the cost of the machine in the balance as against the salesman's wages. Clearly the imposition of a 2% tax would lead the store proprietor who is in the marginal position to employ labor, which is

not a commodity (under the law) or a subject of commerce, rather than buy a machine which is the subject of commerce. The direct effect of the tax is to promote resistance to the sale of machines and thus reduce traffic in goods, both interstate and otherwise.

If one State is free to tax the sale of goods in interstate commerce, provided only that it taxes its own identical goods at the same rate, the power could easily be used to exclude goods of a type not locally manufactured in order to give an advantage to local manufacturers of goods which could be substituted for them. For example, New York State having many factories for the manufacture of candy, but none or few for cigarettes, may promote its own industry by imposing a burdensome sales tax on cigarettes and none on candy. This would actually, even though not ostensibly, be discrimination as against the non-resident manufacturer of cigarettes, although if we confine our attention to the identical article, local and non-resident sellers are taxed at the same rate. The effect of such legislation would be to promote trade rivalries and reprisals between the States. This it was the fundamental object of the commerce clause to prevent.

POINT IV.

***Felt & Tarrant Manufacturing Co. v. Gallagher*, 308 U. S. 62, is not analogous.**

The California use tax was sustained as a tax on property or use of property. No such classification of the tax in the instant case would be possible. To treat the distinction between a tax on property and one on interstate sales as one of form rather than substance, as petitioner appears to do, would ignore a long line of decisions of this Court and would reduce the subject matter to a chaotic condition.

But if this tax is to be treated as a tax on property, such as the tax involved in the *Felt & Tarrant* case, and not on interstate commerce, it is to the New York laws relating to *property* taxes rather than to sales taxes that we must look in order to ascertain the legislative intent with respect to the imposition of liability on a non-resident vendor of the taxed property. The New York City Personal Property Tax Law contains the New York provisions with relation to the kind of tax considered in the *Felt & Tarrant* case. It, and the City Sales Tax Law, taken together, embody a comprehensive scheme of taxation similar to the California sales and use taxes.

The Personal Property Tax Law (Local Law No. 25*), printed in full as an appendix to this brief, provides for the imposition of "a tax upon certain personal property situated or owned within the City of New York." Section 1 of the law, dealing with "IMPOSITION OF TAX", provides for a 2% tax on the value of "certain articles of personal property situated or owned within the City of New York" to be paid by the owner, exempting, however, articles upon which a sales tax has been paid. In this respect the law is substantially the same as the California use tax act. There is however a fundamental difference between the two laws in the respect that the California statute requires the non-resident seller to act as the State's collecting agency with respect to the use tax which may become due from California storers, users or consumers, or to insure payment of the tax if it fails to collect. There is no similar provision in the New York Personal Property tax. Section 7 of that act provides:

*Printed as No. 26 in the official compilation entitled "Local Laws of the Cities in the State of New York enacted during the year 1934."

"§ 7. **PAYMENT OF TAXES.** In the event that the owner of personal property fails to file a return and pay the tax imposed by this law within the time aforesaid set forth, each prior owner of such personal property subject to such tax whose ownership has been acquired or has extended over such property during the year nineteen hundred thirty-five, shall be liable for such tax in full, and if the property has been subject to the ownership of several such persons during the year nineteen hundred thirty-five such liability shall be in inverse order of the order of ownership, and upon default of payment of the tax by any owner subsequent in time the comptroller may proceed against any owner prior in time, *unless during the ownership of such prior owner such property was not within the classification of property upon which this tax is imposed.*"

It is quite clear that the italicised clause excludes the non-resident prior owner of the property from any duty of collection or payment, and manifests the legislative intent in New York to exempt the non-resident vendor from any duty or liability with respect to property or use taxes.

CONCLUSION.

The judgment should be affirmed. If, however, the Court should decide that the tax is not violative of the Commerce Clause, the case should be remanded to the State Court for consideration of the question of construction of the Enabling Act.

Dated: December 30, 1939.

Respectfully submitted,

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Attorneys for Respondents.

APPENDIX**Local Law No. 25.†**

A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health by the imposition of a tax upon certain personal property situated or owned within the city of New York.

Became a law December 28, 1934, with the approval of the Mayor. Passed on message of necessity by the local legislative body of the city of New York.

Be it enacted by the municipal assembly of the city of New York as follows:

Section 1. IMPOSITION OF TAX. During the period commencing on January first, nineteen hundred thirty-five, and ending on December thirty-first, nineteen hundred thirty-five, there shall be paid by the owner a tax of two per centum upon the value of the following-named articles of personal property situated or owned within the city of New York.

- a. Furs and fur products.
- b. Radios, automatic sound and musical reproduction devices, and all other musical instruments of any kind whatsoever.
- c. Automobiles, motor trucks, busses, airplanes, motor boats or any other type of motor vehicle or any part or part of or for the same.
- d. Building materials, including all products or materials designed to be used or actually used for the affixation

† Printed as No. 26 in the official compilation entitled "Local Laws of the Cities in the State of New York enacted during the year 1934." The provisions of this law were substantially reenacted by Local Law No. 31 of 1935 (as amended by Local Law No. 13 of 1935) and Local Law No. 28 of 1936.

to or improvement of real property, including all materials accessory to such affixation or improvement such as pipes, conduits or any item or material used in any manner in building construction or in the improvement of real property within the city of New York.

e. Machinery of every type and variety, including typewriters and all other business machinery and refrigerators and all other machinery or mechanical equipment for domestic use.

f. Furniture and interior furnishings of every type and variety, including all objects used for the furnishing or decoration of the interior of home, office or commercial buildings.

g. Jewelry, silverware, precious metals and precious stones.

§ 2. EXEMPTIONS. No tax, as imposed by section one of this title, shall be due or payable in any event upon any of the articles enumerated in the said section one, and no return need be made thereon pursuant to the provisions of this law if any of the following conditions be demonstrated to the satisfaction of the comptroller.

a. That the said article was purchased prior to January first, nineteen hundred thirty-five.

b. That the said article is of less than one hundred dollars in value, except in the case of building materials and supplies, in which event the exemption of this subsection shall not be applicable.

c. That the said article is one upon the receipt from the sale of which a tax has been paid pursuant to the provisions of this law or local law twenty, of nineteen hundred thirty-four, as amended.

d. That the said article is a bona fide work of art.

e. That the said article has been manufactured within the city of New York for sale by the manufacturer upon

which sale a tax pursuant to local law number twenty of nineteen hundred thirty-four as amended, will be paid; or, that the said article constitutes a part of a dealer's stock within the city of New York and is owned only pending a sale upon which a tax pursuant to local law number twenty of nineteen hundred thirty-four, as amended, will be paid.

§ 3. VALUATION. For the purposes of the tax levied by this local law, such articles of personal property as are subject to such tax shall be evaluated for taxing purposes at the actual purchase price, and if such purchase price is not available such valuation shall be made in such manner as the comptroller shall direct.

§ 4. TIME AT WHICH TAX IS DUE. The tax imposed by this local law shall be due and payable on April fifteenth, nineteen hundred thirty-five, with respect to property acquired on or before March thirty-first, nineteen hundred thirty-five; on July fifteenth, nineteen hundred thirty-five with respect to property acquired on or before June thirtieth, nineteen hundred thirty-five, on October fifteenth, nineteen hundred thirty-five with respect to property acquired on or before September thirtieth, nineteen hundred thirty-five; and on January fifteenth, nineteen hundred thirty-six, with respect to all other property subject to tax hereunder. In the event that such personal property subject to the tax imposed by this local law shall be destroyed or shall lose its identity by affixation to real estate or otherwise the whole tax imposed by this local law shall be due and payable at the time of such destruction or such loss of identity by affixation or otherwise.

§ 5. COLLECTION OF THE TAX. The comptroller shall by regulation prescribe a method or methods for the collection of the tax imposed by this local law from the persons liable for the same. Except as otherwise prescribed herein, the owner of such property shall in all cases be liable for the tax herein imposed.

§ 6. RETURNS. Every owner of personal property subject to the provisions of this local law shall file with the

comptroller a return showing the amount of such personal property subject to such tax and the taxes payable thereon. Such return shall be filed on or before the date upon which such tax is due, and if such tax be paid upon the filing of such return, no penalty shall be assessed against such taxpayer.

§ 7. **PAYMENT OF TAXES.** In the event that the owner of personal property fails to file a return and pay the tax imposed by this law within the time aforesaid set forth, each prior owner of such personal property subject to such tax whose ownership has been acquired or has extended over such property during the year nineteen hundred thirty-five, shall be liable for such tax in full, and if the property has been subject to the ownership of several such persons during the year nineteen hundred thirty-five such liability shall be in inverse order of the order of ownership, and upon default of payment of the tax by any owner subsequent in time the comptroller may proceed against any owner prior in time, unless during the ownership of such prior owner such property was not within the classification of property upon which this tax is imposed.

§ 8. **DETERMINATION OF TAX BY THE COMPTROLLER.** If a return required by this local law is not filed, or if a return when filed is incorrect or insufficient, the comptroller shall determine the amount of the tax due from such information as he may be able to obtain. The comptroller shall give notice of such determination to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall within thirty days apply to the comptroller for a hearing on such determination and shall deposit the full amount of such tax, with all penalties, with the comptroller, in which case the said determination shall be suspended until after such hearing as the comptroller, or his duly designated representative, may grant.

§ 9. **PROCEEDING TO RECOVER TAX.** Whenever any person shall fail to collect and pay over any tax and/or to pay

any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of such person which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due there-

under as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 10. GENERAL POWERS OF THE COMPTROLLER. In addition to the powers granted to the comptroller in this local law, he is hereby authorized and empowered:

(a) To make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

(b) To extend, for cause shown, the time for filing any return for a period not exceeding thirty days; and for cause shown, to remit penalties and interest; and to compromise disputed claims in connection with the taxes hereby imposed;

(c) To assess, revise, readjust and impose the taxes authorized to be imposed under this local law;

(d) To delegate his functions hereunder to a deputy comptroller or other employee or employees of the department of finance of the city of New York.

§ 11. ADMINISTRATION OF OATHS AND COMPELLING TESTIMONY. The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper

proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§ 12. PENALTIES. Any person failing to file a return or to pay over any tax to the comptroller within the time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

§ 13. DISPOSITION OF REVENUES. All revenues and monies resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from

the hardships and suffering caused by unemployment including the repayment of monies borrowed or to be borrowed in anticipation of this tax.

§ 14. APPLICATION; CONSTRUCTION. If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local law shall be construed in conformity with chapter eight hundred seventy-three, laws of nineteen hundred and thirty-four, pursuant to which it is enacted.

§ 15. EFFECTIVE DATE OF LOCAL LAW. This local law shall take effect immediately.